

1 insurance benefits (DIB) and supplemental security income (SSI). (Tr.
2 154-162.) He alleged disability due to heart disease/angina,
3 degenerative disk disease, sensorineural hearing loss, hand tremor,
4 depression, panic disorder, and somatoform disorder, with an onset
5 date of November 27, 2003. (Tr. 170.) Benefits were denied initially
6 and on reconsideration. (Tr. 97-104, 107-110.) Plaintiff requested a
7 hearing before an administrative law judge (ALJ), which was held
8 before ALJ Mary Reed April 20, 2006. (Tr. 740-801.) At the hearing,
9 Plaintiff, who was represented by counsel, testified, as did
10 plaintiff's mother, Lois Moseby, and vocational expert (VE) Tom
11 Moreland. A supplemental hearing was held February 15, 2007.
12 Plaintiff, her mother, Tom Moreland, and W. Scott Mabee, Ph.D.,
13 testified. (Tr. 29-85.) The ALJ denied benefits and the Appeals
14 Council denied review. (Tr. 7-21, 90-93.) The matter is before the
15 court pursuant to 42 U.S.C. § 405(g).

16 **STATEMENT OF FACTS**

17 The facts of the case are set forth in detail in the transcript
18 of proceedings, and are briefly summarized here. Plaintiff was
19 48 years old at onset. (Tr. 154.) He graduated from high school, and
20 has worked as a heavy equipment mechanic, log truck driver, and
21 service manager. (Tr. 67, 173-174, 179.) He testified some days he
22 can barely move due to knee, back and neck pain. (Tr. 60.) At times
23 he sleeps more than 24 hours, and usually has to lie down and rest.
24 He does not know the reason for his fatigue. (Id.) He last drank
25 alcohol two to three weeks before the supplemental hearing. (Tr. 63-
26 65.)

27 **SEQUENTIAL EVALUATION PROCESS**

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1 The Social Security Act (the "Act") defines "disability" as the
2 "inability to engage in any substantial gainful activity by reason of
3 any medically determinable physical or mental impairment which can be
4 expected to result in death or which has lasted or can be expected to
5 last for a continuous period of not less than twelve months." 42
6 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A). The Act also provides that a
7 Plaintiff shall be determined to be under a disability only if any
8 impairments are of such severity that a Plaintiff is not only unable
9 to do previous work but cannot, considering Plaintiff's age, education
10 and work experiences, engage in any other substantial gainful work
11 which exists in the national economy. 42 U.S.C. §§ 423 (d)(2)(A),
12 1382c(a)(3)(B). Thus, the definition of disability consists of both
13 medical and vocational components. *Edlund v. Massanari*, 253 F. 3d
14 1152, 1156 (9th Cir. 2001).

15 The Commissioner has established a five-step sequential
16 evaluation process for determining whether a person is disabled. 20
17 C.F.R. §§ 404.520, 416.920. Step one determines if the person is
18 engaged in substantial gainful activities. If so, benefits are
19 denied. 20 C.F.R. §§ 404.1520(a)(4)(I), 416.920(a)(4)(i). If not, the
20 decision maker proceeds to step two, which determines whether
21 Plaintiff has a medically severe impairment or combination of
22 impairments. 20 C.F.R. §§ 404. 1520(a)(4)(ii), 416.920(a)(4)(ii).

23 If Plaintiff does not have a severe impairment or combination of
24 impairments, the disability claim is denied. If the impairment is
25 severe, the evaluation proceeds to the third step, which compares
26 Plaintiff's impairment with a number of listed impairments
27 acknowledged by the Commissioner to be so severe as to preclude

1 substantial gainful activity. 20 C.F.R. §§ 404.1520(a)(4)(ii),
2 416.920(a)(4)(ii); 20 C.F.R. § 404 Subpt. P, App. 1. If the
3 impairment meets or equals one of the listed impairments, Plaintiff is
4 conclusively presumed to be disabled. If the impairment is not one
5 conclusively presumed to be disabling, the evaluation proceeds to the
6 fourth step, which determines whether the impairment prevents
7 Plaintiff from performing work which was performed in the past. If a
8 Plaintiff is able to perform previous work, that Plaintiff is deemed
9 not disabled. 20 C.F.R. §§ 404.1520(a)(4)(iv), 416.920(a)(4)(iv). At
10 this step, Plaintiff's residual functional capacity ("RFC") assessment
11 is considered. If Plaintiff cannot perform this work, the fifth and
12 final step in the process determines whether Plaintiff is able to
13 perform other work in the national economy in view of Plaintiff's
14 residual functional capacity, age, education and past work experience.
15 20 C.F.R. §§ 404.1520(a)(4)(v), 416.920(a)(4)(v); *Bowen v. Yuckert*,
16 482 U.S. 137 (1987).

17 The initial burden of proof rests upon Plaintiff to establish a
18 prima facie case of entitlement to disability benefits. *Rhinehart v.*
19 *Finch*, 438 F. 2d 920, 921 (9th Cir. 1971); *Meanel v. Apfel*, 172 F. 3d
20 1111, 1113 (9th Cir. 1999). The initial burden is met once Plaintiff
21 establishes that a physical or mental impairment prevents the
22 performance of previous work. The burden then shifts, at step five,
23 to the Commissioner to show that: (1) Plaintiff can perform other
24 substantial gainful activity, and (2) a "significant number of jobs
25 exist in the national economy" which Plaintiff can perform. *Kail v.*
26 *Heckler*, 722 F. 2d 1496, 1498 (9th Cir. 1984).

27 **STANDARD OF REVIEW**

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1 Congress has provided a limited scope of judicial review of a
2 Commissioner's decision. 42 U.S.C. § 405(g). A court must uphold the
3 Commissioner's decision, made through an ALJ, when the determination
4 is not based on legal error and supported by substantial evidence.
5 See *Jones v. Heckler*, 760 F. 2d 993, 995 (9th Cir. 1985); *Tackett v.*
6 *Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999).

7 "The [Commissioner's] determination that a plaintiff is not disabled
8 will be upheld if the findings of fact are supported by substantial
9 evidence." *Delgado v. Heckler*, 722 F. 2d 570, 572 (9th Cir. 1983)
10 (citing 42 U.S.C. § 405(g)). Substantial evidence is more than a mere
11 scintilla, *Sorenson v. Weinberger*, 514 F. 2d 1112, 1119 n. 10 (9th Cir.
12 1975), but less than a preponderance. *McAllister v. Sullivan*, 888 F.
13 2d 599, 601-602 (9th Cir. 1989); *Desrosiers v. Secretary of Health and*
14 *Human Services*, 846 F. 2d 573, 576 (9th Cir. 1988). Substantial
15 evidence "means such evidence as a reasonable mind might accept as
16 adequate to support a conclusion." *Richardson v. Perales*, 402 U.S.
17 389, 401 (1971)(citations omitted). "[S]uch inferences and
18 conclusions as

19 the [Commissioner] may reasonably draw from the evidence" will also
20 be upheld. *Mark v. Celebrezze*, 348 F. 2d 289, 293 (9th Cir. 1965).
21 On review, the court considers the record as a whole, not just the
22 evidence supporting the decision of the Commissioner. *Weetman v.*
23 *Sullivan*, 877 F.2d 20, 22 (9th Cir. 1989)(quoting *Kornock v. Harris*,
24 648 F.2d 525, 526 (9th Cir. 1980)).

25 It is the role of the trier of fact, not this court, to resolve
26 conflicts in evidence. *Richardson*, 402 U.S. at 400. If evidence
27 supports more than one rational interpretation, the court may not

1 substitute its judgment for that of the Commissioner. *Tackett*, 180
2 F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579 (9th Cir. 1984).
3 Nevertheless, a decision supported by substantial evidence will still
4 be set aside if the proper legal standards were not applied in
5 weighing the evidence and making the decision. *Browner v. Secretary*
6 *of Health and Human Services*, 839 F.2d 432, 433 (9th Cir. 1988). Thus,
7 if there is substantial evidence to support the administrative
8 findings, or if there is conflicting evidence that
9 will support a finding of either disability or nondisability, the
10 finding of the Commissioner is conclusive. *Sprague v. Bowen*, 812
11 F. 2d 1226, 1229-1230 (9th Cir. 1987).

12 ADMINISTRATIVE DECISION

13 At the onset ALJ Reed found plaintiff was insured for DIB
14 purposes through December 31, 2007. (Tr. 7, 9.) At step one, the
15 ALJ found plaintiff has not engaged in substantial gainful activity
16 since onset. (Tr. 10.) At steps two and three, she found plaintiff
17 had impairments of degenerative disk disease, sensorineural hearing
18 loss, panic disorder, and somatoform disorder, which are severe, but
19 do not meet the requirements of any Listed impairment. (Tr. 10-12.)
20 She found plaintiff has the RFC for a significant range of light
21 work. (Tr. 12-13.) With respect to mental impairments, plaintiff is
22 moderately limited in the ability to carry out detailed
23 instructions. (Tr. 13.) At step four, relying on the VE's
24 testimony, the ALJ found that plaintiff is unable to perform his
25 past relevant work as a heavy equipment mechanic, log truck driver,
26 or service manager. (Tr. 19.) At step five, also relying on the VE,
27 the ALJ found plaintiff can perform other work, including electrical

1 assembler, housekeeper, and laundry worker. (Tr. 20.) The ALJ found
2 plaintiff was, therefore, not under a "disability" as defined by the
3 Social Security Act. (Tr. 21.)

4 ISSUES

5 The question is whether the ALJ's decision is supported by
6 substantial evidence and free of legal error. Plaintiff argues the
7 ALJ erred in weighing the medical and lay evidence, failing to
8 develop the record, and in finding other available work at step
9 five. (Ct. Rec. 24 at 8-20.) The Commissioner responds that the
10 ALJ's decision is without error and supported by substantial
11 evidence. (Ct. Rec. 29 at 1.)

12 DISCUSSION

13 A. Weighing the medical evidence

14 Plaintiff alleges that the ALJ erred by failing to properly
15 credit the opinions of treating professionals Thomas Boone, M.D.,
16 and William Murphy, M.D., and examining psychologist Joyce Everhart,
17 Ph.D., and compounded the problem by giving too much credit to the
18 opinions of examining psychologist Thomas McKnight, Ph.D., and
19 testifying psychologist W. Scott Mabee, Ph.D.

20 A treating physician's opinion is given special weight because
21 of familiarity with the claimant and the claimant's physical
22 condition. *Fair v. Bowen*, 885 F. 2d 597, 604-05 (9th Cir. 1989).
23 Thus, more weight is given to a treating physician than an examining
24 physician. *Lester v. Cater*, 81 F.3d 821, 830 (9th Cir. 1996).
25 Correspondingly, more weight is given to the opinions of treating
26 and examining physicians than to nonexamining physicians. *Benecke*
27 *v. Barnhart*, 379 F. 3d 587, 592 (9th Cir. 2004). If the treating or

1 examining physician's opinions are not contradicted, they can be
2 rejected only with clear and convincing reasons. *Lester*, 81 F. 3d
3 at 830. If contradicted, the ALJ may reject an opinion if he states
4 specific, legitimate reasons that are supported by substantial
5 evidence. See *Flaten v. Secretary of Health and Human Serv.*, 44 F.
6 3d 1435, 1463 99th Cir. 1995).

7 In addition to the testimony of a nonexamining medical advisor,
8 the ALJ must have other evidence to support a decision to reject the
9 opinion of a treating physician, such as laboratory test results,
10 contrary reports from examining physicians, and testimony from the
11 claimant that was inconsistent with the treating physician's
12 opinion. *Magallanes v. Bowen*, 881 F.2d 747, 751-52 (9th Cir. 1989);
13 *Andrews v. Shalala*, 53 F.3d 1042-43 (9th Cir. 1995).

14 The medical evidence at issue includes plaintiff's cardiac
15 problems, a cognitive disorder diagnosed by examining psychologist
16 Dr. Everhart, and a hand tremor. (Ct. Rec. 24 at 8-14.) The ALJ did
17 not find angina or small vessel heart disease (or any cardiac
18 condition) a severe impairment at step two. (Tr. 10-11.) At step
19 two the ALJ found plaintiff suffers from degenerative disc disease,
20 hearing loss, a panic disorder and a somatoform disorder. (Tr. 10.)
21 Plaintiff contends the ALJ erred by failing to credit at step two
22 the diagnoses of treating physicians Drs. Boone and Murphy that
23 plaintiff suffers from angina and arguably small vessel heart
24 disease. (Ct. Rec. 24 at 9.)

25 The Commissioner responds that plaintiff has a long history of
26 complaining of severe chest pain, but his treating doctors could not
27 identify a cardiac-related cause for his symptoms. (Ct. Rec. 29 at

1 5, citing Tr. 247-248, 279-280, 297-299, 342, 503-510.) He notes
2 that in May of 2006, a one-day nuclear perfusion stress test
3 revealed "some borderline mild ischemia." (Ct. Rec. 29 at 5, citing
4 Tr. 640.) A further cardiovascular study showed, the Commissioner
5 notes, plaintiff "may have an element of small vessel disease."
6 (Ct. Rec. 29 at 5, citing Tr. 644.) The Commissioner then argues
7 that the mere diagnosis of an ailment says nothing about its
8 severity, since conditions properly treated and controlled
9 effectively are not severe. (Ct. Rec. 29 at 5, citing *Higgs v.*
10 *Bowen*, 880 F. 2d 860, 863 (6th Cir. 1988); *Warre v. Commissioner*, 439
11 F. 3d 1001, 1006 (9th Cir. 2006).

12 The Commissioner notes treating cardiologist Dr. Murphy
13 encouraged plaintiff in May of 2006 to continue taking cardizem to
14 control his angina, and treated his "possible small vessel disease
15 with medication"; thereafter, plaintiff only reported chest pain
16 once. At that time, Dr. Murphy opined it was probably caused by
17 compression neuropathy. (Ct. Rec. 29 at 5-6, citing Tr. 641, 734-
18 735.) This is the evidence the Commissioner cites supporting the
19 ALJ's step two determination with respect to plaintiff's complaints
20 of chest pain. The Commissioner fails to address the medical
21 evidence of chest pain from onset until May of 2006 - a relevant
22 period of three years.

23 The ALJ went on to adopt the findings of the reviewing agency
24 professionals and of the testifying psychologist. With respect to
25 cardiac impairment, the ALJ stated:

26 Prior to his alleged onset date of disability
27 [November 27, 2003] the claimant was prescribed
nitroglycerin and Norvasc for chest pain. EKGs

1 performed prior to the claimant's alleged onset
2 date of disability were normal, and myocardial
3 infarction was ruled out as the source of the
claimant's chest pain in February of 2001 (Exhibit
32F/8.)

4 In early 2005 the claimant was transferred to the
5 hospital from jail with complaints of chest pain.
6 He was diagnosed with hyperventilation syndrome
7 and chest wall pain. At that time it was noted
8 that the claimant had had a similar history of such
9 pain and that he had had multiple negative cardiac
10 work-ups (Exhibit 9F/3). On February 8, 2005 cardiac
11 work-up demonstrated the claimant to have normal
12 right dominant coronary vasculature and normal
13 left ventricular function with an ejection fraction
14 of 60%. Moderate aortic root dilation was noted, but
there was no aortic insufficiency (Exhibit 2F/3).
William D. Murphy, M. D., the examining cardiologist,
was of the opinion that the claimant's chest pain did
not have a cardiac cause (Exhibit 1F/4). In March of
2005 the claimant's chest pain was described as being
non-specific. It was noted that EKG and cardiac enzymes
had been normal and it was unlikely that the claimant's
chest pain represented acute coronary syndrome or a
life-threatening event (Exhibit 8F/3).

15 On May 2, 2006, the claimant's ischemia was described
16 as being borderline and mild (Exhibit 52F/1). It was also
17 noted that Cardizem was helping to control his angina
18 (Exhibit 52F/2). [A] [O]ne-day nuclear persantine stress
19 test on that date demonstrated normal overall left
20 ventricular function and wall motion (Exhibit 52F/4).
21 Cardiac catheterization on May 6, 2006 revealed that
22 the left main coronary artery was normal and bifurcated
into the anterior descending and circumflex branches.
Some systolic compression was noted in the mid portion
of the vessel, but this was described as being mild.
The circumflex artery and the right coronary artery
were noted as being free of disease (Exhibit 52F/5 and
6). The claimant was described as having only an element
of small vessel disease that would be treated
medically (Exhibit 52F/6).

23 Based on all of the foregoing, the undersigned has
24 concluded the claimant has no severe cardiac impairment.
25 His chest pain/angina would not pose more than
26 minimal limitations on his ability to perform basic
work-related activities and would not therefore be severe
in and of itself or in combination with other impairments.

(Tr. 10-11.)

27 An impairment or combination of impairments may be found "not
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1 severe only if the evidence establishes a slight abnormality that
2 has no more than a minimal effect on an individual's ability to
3 work." *Webb. Barnhart*, 433 F. 3d 683, 686-687 (9th Cir. 2005)(citing
4 *Smolen v. Chater*, 80 F. 3d 1273, 1290 (9th Cir. 1996); see *Yuckert v.*
5 *Bowen*, 841 F. 2d 303, 306 (9th Cir. 1988). If an adjudicator is
6 unable to determine clearly the effect of an impairment or
7 combination of impairments on the individual's ability to do basic
8 work activities, the sequential evaluation should not end with the
9 not severe evaluation step. S.S.R. No. 85-28 (1985). Step two,
10 then, is "a de minimus screening device [used] to dispose of
11 groundless claims," *Smolen*, 80 F. 3d at 1290, and an ALJ may find
12 that a claimant lacks a medically severe impairment or combination
13 of impairments only when his conclusion is "clearly established by
14 medical evidence." S.S.R. 85-28. The question on review is whether
15 the ALJ had substantial evidence to find that the medical evidence
16 clearly established that the claimant did not have a medically
17 severe impairment or combination of impairments. *Webb*, 433 F. 3d at
18 687; see also *Yuckert*, 841 F. 2d at 306.

19 Although the medical record is not entirely clear, it is the
20 opinion of the undersigned that the record of plaintiff's
21 hospitalizations and other treatment for chest pain includes medical
22 evidence establishing more than a slight abnormality that has more
23 than a minimal effect on his ability to work. It is unclear after
24 reviewing the entire record whether plaintiff's chest pain was
25 caused by cardiac problems, anxiety, panic problems, a somatoform
26 disorder or process, or a combination of these. As noted, the
27 Commissioner's argument that plaintiff's chest pain appeared to

1 resolve after May of 2006 does not answer how the condition affected
2 plaintiff during the prior three years from onset until that date.
3 The medical record shows multiple hospitalizations and courses of
4 treatment with different medication. Treating physicians Boone and
5 Murphy have given different assessments of the causes and treatment
6 for plaintiff's chest pain over time; Dr. Boone opined in March and
7 April of 2005 that the marked impairment caused by severe stress and
8 chest pain made it impossible for plaintiff to work at that time.
9 While the ALJ was not required to adopt this opinion, her reasons
10 for rejecting it appear to be based partly on a selective reading of
11 Dr. Murphy's records and on the opinions of the agency consultants,
12 but little else. While Dr. Mabee testified with respect to
13 psychological impairment, no medical expert testified with respect
14 to plaintiff's physical impairments, nor to the possible connection
15 between the two. The record clearly shows chest pain of sufficient
16 severity to pass the de minimus test.

17 While he is a psychologist rather than a medical doctor, the
18 report by Thomas McKnight, Ph.D., shows he reviewed recent ER
19 records of chest pain without cardiac origin, and a record
20 (apparently from treating physician Dr. Boone) dated April 4, 2005,
21 assessing hypertension, "better with medication," along with angina
22 with a coronary artery spasm and severe stress and anxiety. (Tr.
23 326.) Dr. McKnight opines Dr. Boone's basis for assessing severe
24 anxiety and depression appears to be plaintiff's self-report.
25 Plaintiff denied any continuing mental health treatment. (Id.) Dr.
26 McKnight observed no depression and only mild anxiety; he thought
27 plaintiff "seemed somewhat overly medicated." (Tr. 328.)

1 After testing, Dr. McKnight opined plaintiff has no cognitive
2 or psychological barriers to full-time employment. He diagnosed
3 apparent episodic panic disorder without agoraphobia, addressed with
4 medication, probably over-medicated, and assessed a GAF of 70¹. (Tr.
5 330.) It is not known to what extent "over medication" may
6 have affected the evaluation. Thereafter, Dr. Everhart assessed a
7 cognitive disorder. Plaintiff has apparently suffered two closed
8 head injuries. Testifying psychologist W. Scott Mabee, Ph.D.,
9 disagreed with Dr. Everhart's diagnosis. Testing did not reveal
10 malingerer.

11 In Social Security cases, the ALJ has a special duty to
12 develop the record fully and fairly and to ensure that the
13 claimant's interests are considered, even when the claimant is
14 represented by counsel. *Tonapetyan v. Halter*, 242 F.3d 1144, 1150

15 ¹A Global Assessment of Functioning (GAF) of 70 indicates some
16 mild symptoms (e.g., depressed mood and mild insomnia) or some
17 difficulty in social, occupational or school functioning (e.g.,
18 occasional truancy, or theft within the household), but generally
19 functioning pretty well, has some meaningful interpersonal
20 relationships. DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL
21 DISORDERS, 4th Ed., (DSM-IV), at 32/
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1 (9th Cir. 2001); *Brown v. Heckler*, 713 F.2d 441, 443 (9th Cir.1983).
2 An ALJ's duty to develop the record further is triggered only when
3 there is ambiguous evidence or when the record is inadequate to
4 allow for proper evaluation of the evidence. *Tonapetyan v. Halter*,
5 242 F.3d at 1150.

6 Because the step two error with respect to chest pain requires
7 remand, the cognitive function disorder diagnosed by Dr. Everhart
8 during her consultative examination may require additional
9 clarification. Similarly, on remand, plaintiff's hand tremor of
10 unknown origin mentioned in several records may be addressed by
11 additional testing. The court does not express an opinion whether
12 these latter problems, alone or in combination, are sufficient to
13 pass the de minimus threshold of step two, *See Smollen*, 80 F. 3d at
14 1290, nor of what the outcome on remand should be.

15 Though plaintiff ultimately bears the burden of establishing
16 his disability, the ALJ has an affirmative duty to supplement
17 plaintiff's medical record (perhaps with additional testing), to the
18 extent the record was incomplete, before rejecting these impairments
19 at so early a stage in the analysis, particularly in light of the
20 opinion of a treating physician that plaintiff suffers severe
21 impairments likely to interfere with employment. "In Social Security
22 cases the ALJ has a special duty to fully and fairly develop the
23 record and to assure that the claimant's interests are considered."
24 *Webb*, 433 F. 3d at 687, *citing Brown v. Heckler*, 713 F. 2d 441, 443
25 (9th Cir. 1983) (per curiam).

26 The ALJ's finding at step two that plaintiff suffers no severe
27 impairment caused by chest pain is not clearly established by the

1 medical evidence. Accordingly, the case must be remanded for
2 additional proceedings to correct the legal error. On remand
3 additional consideration should be given to whether plaintiff has a
4 severe impairment from a hand tremor and/or a cognitive disorder.

5 The ALJ erred by rejecting plaintiff's chest pain as a severe
6 impairment at step two because the determination is not supported by
7 the medical evidence.

8 CONCLUSION

9 Having reviewed the record and the ALJ's conclusions, the court
10 finds that the ALJ's decision at step two that plaintiff suffers no
11 severe impairment as a result of chest pain is not clearly established
12 by the medical evidence. Because the ALJ committed this error at step
13 two, the case is remanded for further proceedings. On remand if
14 appropriate the ALJ should also consider whether additional testing
15 reveals limitations caused by a hand tremor or a cognitive disorder.
16 Accordingly,

17 IT IS ORDERED:

18 1. Plaintiff's Motion for Summary Judgment (**Ct. Rec. 22**) is
19 **GRANTED**. The case is remanded for further administrative proceedings.

20
21 2. Defendant's Motion for Summary Judgment (**Ct. Rec. 28**) is
22 **DENIED**.

23 The District Court Executive is directed to file this Order and
24 provide a copy to counsel for Plaintiff and Defendant. Judgment shall
25 be entered for Plaintiff and the file shall be **CLOSED**.

26 DATED this 20th day of April, 2009.

s/ James P. Hutton

JAMES P. HUTTON
UNITED STATES MAGISTRATE JUDGE